DEPARTMENT OF JUSTICE

BELL OPERATING COMPANY INTERLATA ENTRY UNDER SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996: SOME THOUGHTS

REMARKS

by

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before the

Communications Committee
NARUC Summer Meeting

Los Angeles, California

July 22, 1996

Introduction

I am pleased to be here today with NARUC's Telecommunications Committee, to hear more about the States' views regarding the procedures for entry by the Bell operating companies into in-region interLATA services under section 271 of the Telecommunications Act, and also to share a few thoughts about the Justice Department's views. You have been and will continue to be a tremendously important force in helping to promote competition in the local exchange.

Chairman Hundt and the FCC have been doing a great job in reaching out to the States and to us as part of the effort to solicit input from all quarters as they work to implement section 271 of the new law. The thoughtful analysis Chairman Hundt gave at the forum convened by the FCC for the States in Washington, D.C., last month, and his remarks at the Great Lakes - Mid Atlantic conference of State commissioners earlier this month, have moved the process forward and helped us all focus our thinking.

Over at the Department of Justice, we have been actively discussing these issues with the FCC, NARUC, the State commissions, and other interested parties. It is important that we all devote ourselves to getting this right, and work together cooperatively, so that we can help ensure that the new law delivers on its promise of more competition throughout the telecommunications industry, with all the attendant benefits to consumers, businesses, and the economy.

We've been giving a great deal of thought to section 271, under which the Department has a special statutory consulting role. Section 271 not only protects competition in long distance; it also holds a key to ensuring that competition can take root and thrive in all sectors of the industry, including the last bastion of the old telephone monopoly, the local telephone exchange.

The Department's goal, ultimately, is to see competition become the primary organizing principle in all telecommunications markets -- open markets, with everyone permitted to compete against everyone else, everywhere. Open markets, in which ease of business entry and the ability of existing entrants to expand will work to restrain the temptation of any firm to raise prices or otherwise take customer loyalty for granted. I know that is a goal shared by everyone in this room. Properly applied, section 271 can help us achieve that result as soon as possible.

Of course, our ultimate goal is not going to be achieved overnight; and it is not going to be achieved without a lot of work on all our parts. We should all be prepared for the transition to open and competitive markets to take quite a while, given the still-developing state of local exchange technology -- and the monopolized state of local exchange markets -- that we find as the starter's pistol is fired. As Chairman Hundt put it in his recent remarks, "For those who suggest that the new law means the demise of the FCC and its State counterparts, I think a

dose of reality is in order." Assistant Attorney General Anne Bingaman made a similar point in response to a question at a NARUC luncheon in Washington, D.C., a few months ago -- that State regulators will have enormous responsibilities with respect to telecommunications markets in the States for years to come. They are both right.

The Test: Open and Competitive Markets

Section 271 sets out a number of preconditions that must be met before a Bell operating company may receive the FCC's approval to provide interLATA services in its own local telephone service region. The FCC is to determine whether these preconditions are satisfied, but only after consulting with the Department of Justice, as well as with the State commissions of the States involved. So section 271 contemplates that the State commissions and the Department will be integrally involved, and that their -- and our -- assessments will be important to the FCC's decision.

The inclusion of section 271 in the new law serves two important procompetitive purposes. First, it maintains -- while it is still necessary -- the protection against use by a Bell operating company of its local phone service monopoly to impede competition in the market for long distance service -- a market that, historically and up to the present day, still largely depends on reliable interconnection to the Bell's local exchange.

But Congress clearly had more than this in mind in enacting section 271. The interLATA restriction was originally adopted as

part of an antitrust consent decree that took as a given that the local exchange would, for the foreseeable future, remain a regulated monopoly -- whether due to technological constraints that rendered it something of a "natural monopoly," or due to other, jurisdictional constraints. The MFJ's interLATA restriction was designed to protect competition in the long distance market in this environment, mindful of the Bell System's demonstrated ability to use its local exchange monopoly to impede competition there in defiance of the most valiant regulatory efforts. The interLATA restriction served that purpose very well. But the new law has a much more ambitious, laudatory, and far-reaching goal: to bring increased competition to **all** sectors of the industry -- including the local exchange.

Section 271 also serves this second, more ambitious purpose, by setting forth the test by which to gauge whether the local markets are open enough to act as a dependable natural constraint on anticompetitive conduct. If the local markets **are** truly open, and functioning such that the ability and incentive to discriminate and cross-subsidize are effectively constrained, then entry by a Bell operating company into long distance could be a pro-competitive addition to the market.

But if the markets are **not** truly open, and there is no competitive constraint on discrimination and cross-subsidization, then entry by a Bell operating company into long distance, while it still retains too many vestiges of its old local exchange monopoly, could actually **increase** the incentives for the Bell to exploit that power. The Bell's possible reward would be not only

preserving its lucrative local exchange domain, but also using its monopoly there to grab a large piece of the approximately 36 billion dollars a year that the long distance companies now net after paying local exchange access charges.

That would be exactly the opposite result of what Congress intended in enacting the new law. So we must make section 271 work to ensure that the incentives remain in the procompetitive direction. And the prospect of entry into long distance provides a powerful incentive for the Bells to cooperate in truly opening the local exchange markets to competition.

The Justice Department plans to evaluate section 271 applications as to each of the legal requirements, in keeping with our broad consultative authority under the section. We will consider whether the applicant has fully implemented the competitive checklist. We will evaluate whether a predominantly facilities-based competitor is providing the required service to business and residential customers. And we will also consider the broader public interest requirement. Our evaluations will be informed by our particular expertise in competition issues; but we will not limit our analysis to any particular antitrust standard derived from some other law or decree.

We oppose the use of a metric test that requires the Bell operating company to have lost a specific market share or specific number of customers. While information regarding any inroads by competitors in the local exchange will certainly be useful and relevant to the overall analysis, a rigid metric test might be gamed by one party or another, and it could demand more

of the Bell -- or less -- than is necessary to secure open markets and competition. Rather than relying on a rigid metric test, we should ask whether the Bell faces the kind of market in which it has to gear its business toward competing to retain its customers. We should ask whether competitors can successfully enter and expand in the local exchange markets in a timely fashion. Full use of the public interest requirement, along with the competitive checklist and the facilities-based competitor and separate subsidiary requirements, is the route set forth under the statute to ensure that local exchange markets are truly open to all competitors.

A Front-Line Role for the States

Passage of the new law was made possible in part by the leadership of many States in taking steps to promote competition even before the Congress was ready to act. Now that Congress has acted, your help will be needed more than ever. And you are in a position to provide a lot of helpful information. You will have been in the front lines of implementing the interconnection and resale requirements of section 251, shaping rules, arbitrating disputes, and enforcing agreements. So you will have intimate knowledge of the progress -- and any obstacles -- in implementing the market-opening measures that are a precondition to long distance entry. And the new law envisions that you will be the first to review a Bell operating company's interconnection agreements or statements of general terms and conditions to gauge the Bell's compliance with the competitive checklist.

We welcome and encourage the State commissions to take an active role. In fact, we strongly urge you to. You are in the best position to obtain information, because you can compel the parties to produce it, and can conduct proceedings in which issues and evidence can be probed through cross-examination and argument. The information the State commissions provide to us and to the FCC may well become the factual bedrock of our own analyses. So we are interested in hearing from you not only whether you believe each item on the checklist has been satisfied, but precisely **how** it has been satisfied.

We encourage the State commissions to develop a detailed factual record on which to base their assessments, and which will be provided to the FCC and to the Department of Justice. When everyone is arguing about the merits and relevance of all the issues that will be raised in connection with section 271 proceedings, it is essential that there be as full a factual record as possible on these issues.

Let me just mention a sample of the questions we and others will be asking. How many interconnection and resale agreements has the Bell operating company negotiated, and how comprehensive are they? How strong are the competitors who have obtained them, and do those competitors have the capability to expand? What kind of service are they providing? Do the agreements meet the differing needs of all types of competitors, or are issues that are of particular concern to one class of potentially significant competitors still unresolved? If there are unresolved issues, how important and reasonable are the items being demanded by a

competitor that the Bell hasn't agreed to? How receptive has the Bell shown itself to be in general toward negotiating agreements? If competitors succeed in persuading customers to buy competitive local exchange service, can the Bell quickly provide all the unbundled network elements and services for resale that may be requested? What complaints, if any, have there been regarding the Bell's implementation of any agreement? What is the extent of any remaining danger that the Bell can, and would, discriminate against competitors in the provision of elements and services, or cross-subsidize between local and long distance services? Does the access charge structure permit interexchange carriers to compete on an equal footing with the Bell? How might the extent of business and residential local competition in the State, both facilities-based and resale, be expected to change in the near future, and what would the change depend on?

The level of detail will be very important to us all, because your factual record will be used in assessing whether the checklist has been "fully implemented," as section 271 requires. "Fully implemented" means more than just being reflected in an agreement on paper. It means actually being in operation and doing its market-opening work. It means that the required elements and services must be available in a timely and reliable manner and in the quantities that may be requested.

Your factual record will also be used in assessing whether the facilities-based competitor requirement and the public interest requirement are satisfied.

The more fully you can explain your own assessments, and the more fully you can develop the factual record in a timely fashion, the better able we and the FCC will be to put your record and assessments to good use. We are really counting on you.

We are encouraging the States to begin the fact gathering and assessment now, and to begin sharing factual information with us as soon as possible, even before section 271 applications are filed. This is particularly important in States where you believe that the incumbent Bell operating company may apply for long distance entry this year. Once an application is filed, the FCC has only 90 days to decide. That is not much time. And we have even less, because we have to give our evaluation to the FCC in time for the FCC to give it the required substantial weight. Furthermore, the Justice Department does not have independent compulsory process under the section 271 process to gather evidence on our own, as we do in an ordinary antitrust investigation.

The States can save time and effort by keeping the section 271 requirements in mind as they implement the interconnection and unbundling requirements under section 251. Of course, not every interconnection and unbundling agreement that satisfies section 251 will fully satisfy the checklist under section 271. When the agreement has been negotiated by the parties, rather than arbitrated by the State commission, it might in some cases fall short of the checklist. But in examining each negotiated agreement that is brought before you under section 251, and in

arbitrating any disputes, you should also be building the detailed factual record regarding local market conditions that will be needed for section 271.

We are encouraged that last week, States such as Illinois, Ohio, and New York announced the beginning of their efforts to develop this kind of detailed factual record, joining Florida and perhaps other States. Submissions by interested parties are scheduled within the next month. Meanwhile, while we are waiting to hear from the State commissions formally, we are learning as much as we can now, through informal discussions with the States, the FCC, the Bell operating companies, and the competitors seeking interconnection agreements.

The Public Interest Requirement

I would also like to say a few words about the public interest requirement. The public interest requirement has been a central tenet of telecommunications regulatory policy as long as there has been an FCC -- longer, I think. The Supreme Court has made clear that authority to regulate in the public interest is not confined to any formula, but gives the agency exercising that authority wide latitude to consider the big picture as well as all the specific details, in order to do the right thing.[1] The Supreme Court has also made clear that competition is a core

[1] See, e.g., FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981); See also United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc).

concern in public interest analysis.[2] And indeed, numerous FCC public interest rulings have been based explicitly on competition considerations.[3]

But curiously, since enactment of the new law, it has been suggested in certain quarters that the public interest requirement might not have even its customary significance in section 271, and might be just some sort of gratuitous restatement of the competitive checklist, presumed to be satisfied whenever the checklist is. I would like to put that notion to rest.

Certainly, there can be no doubt as to the critical importance of the checklist. It is what brings section 251's interconnection and unbundling requirements -- crucial components in opening the markets -- explicitly into the section 271 equation.

But to us, the equally critical importance of the public interest requirement is unmistakable. Its importance is not only reflected in the express terms of the statute itself, where the requirement is given co-equal billing with the checklist and the

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[2] See, e.g., United States v. RCA, 358 U.S. 334, 351 (1959); See also United States v. FCC, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc).

[3] See, e.g., Sprint Corp., Declaratory Ruling and Order, FCC 95-498 (Dec. 15, 1995); McCAW and AT&T, Memorandum Opinion and Order, FCC 94-238 (September 19, 1994); MCI Communications Corp., British Telecommunications, Declaratory Ruling and Order, FCC 94-188 (July 14, 1994).

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other requirements that the Bells must establish that they satisfy. It is also indicated time after time in the legislative history. Members whose support was absolutely essential to the new law's passage made it clear that an independent public interest requirement, of at least the breadth that public interest requirements generally have before commissions such as the FCC, was essential to their support. It was also an important consideration for President Clinton in signing the new law. This is what the President said in his signing statement:

> "To protect the public, the FCC must evaluate any application for entry into the long distance business in light of its public interest test, which gives the FCC discretion to consider a broad range of issues, such as the adequacy of interconnection arrangements to permit vigorous competition."

True, there were Members who opposed the public interest requirement. But they were in a distinct minority. We know that without a doubt, because some of them offered an amendment in the Senate to delete the public interest requirement, and rely solely on the checklist, and that amendment was defeated. Moreover, in the House-Senate conference on the bill, the Justice Department's role in evaluating entry under section 271 was strengthened, making even clearer that the policy context in which the FCC would be conducting its public interest analysis under section 271 was to include a serious focus on competition, as informed by

the principles of antitrust. Quoting again from the President's signing statement:

> "[I]n deciding whether to grant the application of regional Bell company to offer long distance service , the FCC must accord `substantial weight' to the views of the Attorney General. This special legal standard, which I consider essential, ensures that the FCC and the courts will give full weight to the special competition expertise of the Justice Department's Antitrust Division -- especially its expertise in making predictive judgments about the effect that entry by a Bell company into long distance may have on competition in local and long distance markets."

So you can expect the public interest requirement, and through it broad consideration of competitive conditions in all the affected markets, to be a principal focus of every section 271 evaluation.

Conclusion

Congress has given us all a monumental task, with a lot of work to do and a short time to do it in. But if our efforts succeed, the payoff, in terms of increased competition, economic growth, and innovation, will be tremendous. And one of the most important parts of the new law to get right is the pivotal section 271. We in the Justice Department look forward to continuing our discussions with you as we more fully develop our views, and as section 271 is implemented.